

BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
CINGULAR WIRELESS PCS, LLC AND WALTER HUNGERFORD,

Petitioners

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Chris Blackburn

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John B. McGrath

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Shashikanth Sena

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Board of Appeals Case No. S-2747
(OZAH Referral No. 09-18)

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For the Petitioner

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James R. Michal, Esquire

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Attorney for the Petitioner

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Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. SUMMARY

Current Zone and Use:	I-1 zoning, used as an industrial yard with storage structures, stored vehicles, debris piles, large shipping containers and a 120-foot telecommunication monopole with two wireless carriers.
Proposed Special Exception:	Adding a 30-foot extension to the existing tower to accommodate Petitioner and up to two additional carriers.
Need for Monopole:	The Montgomery County Tower Committee has reviewed the proposal and found that petitioner New Cingular Wireless PCS, LLC has a justified engineering need for the 30-foot extension. This is supported by coverage maps attached as an appendix to this report.
Community:	There has been no community participation in this case.
MNCCPC:	The Montgomery County Planning Board and its Technical Staff recommend approval of the petition.
Hearing Examiner:	The Hearing Examiner recommends approval of the petition on grounds that it satisfies the general and specific conditions for the use and would have no inherent or non-inherent adverse effects sufficient to warrant denial.

II. STATEMENT OF THE CASE

Petition S-2747, filed January 30, 2009, requests a special exception under Section 59-G-2.58 of the Montgomery County Zoning Ordinance for a telecommunications facility, to be constructed on property located at 14615 Clopper Road, Boyds, Maryland, in the I-1 Zone, Tax Account No. 00021970. Petitioner New Cingular Wireless PCS, LLC, doing business as AT&T Mobility (“AT&T”), proposes to add a 30-foot extension to an existing telecommunications tower on the subject property, which was built in 2002 as a use permitted by right. The proposed tower extension is not permitted by right due to a setback issue. Petitioner argues that the extension can be allowed as a special exception, with a partial waiver of the setback requirements. As discussed in Part III.E, the Hearing Examiner agrees. The owners of the subject site, Carol Ann Hungerford and Walter Remus Hungerford, are co-petitioners on this application, as required in the Zoning Ordinance. See Ex. 29; Code §59-G-2.58(a)(5).

Technical Staff of the Maryland-National Capital Park & Planning Commission (“M-NCPPC”) reviewed the present petition and, in a report dated May 18, 2009, recommended approval with conditions.¹ See Ex. 19. Staff submitted supplemental information on June 30, 2009, responding to a question from the Hearing Examiner. See Ex. 21. The Montgomery County Planning Board (“Planning Board”) considered this petition on June 11, 2009 and voted 3 to 0 to recommend approval based on the findings in the Staff Report. See Ex. 20.

On March 11, 2009 the Board of Appeals scheduled a public hearing in this matter for July 2, 2009, to be conducted by a hearing examiner from the Office of Zoning and Administrative Hearings. The public hearing was convened as scheduled, at which time testimony and other evidence were received in support of the proposed special exception. The record contains no evidence of opposition to this proposal. The record was held open to permit additional submissions by AT&T and allow time

¹ The Staff Report has been liberally paraphrased and quoted in Parts I and II of this report.

for public comment, and closed on August 10, 2009. By Order dated October 8, 2009, the Hearing Examiner extended the deadline for her report to October 9, 2009.

III. BACKGROUND

For the reader's convenience, background information is grouped by subject matter.

A. The Subject Property and Neighborhood

The subject property consists of approximately 6.14 acres located on the north side of Clopper Road in Boyds. The owner has operated Remus Hungerford Industrial Yard at the site for many years. The site is irregular in shape and contains a variety of things including storage buildings, large shipping containers, stored vehicles and debris piles. Most pertinent to the present case is an existing 120-foot telecommunication tower, with associated equipment in a compound measuring 90 feet by 54 feet. The tower was built on the site in 2002 pursuant to a building permit issued by the Department of Permitting Services ("DPS"), although inexplicably, the tower violates the applicable setback to the north. A telecommunication facility is a permitted use in an I-1 Zone up to 199 feet in height, provided that it is set back from any property with residential or agricultural zoning at least one foot for every foot of height of the support structure. Code § 59-C-5.2(c), n.4. The existing 120-foot tower is 100 feet from the northern property line and 145 feet from the southern property line. See Staff Report at 3. The properties abutting the subject site on all four sides are classified under the Rural Zone, one of the County's agricultural zones. See Zoning Map, Ex. 16. Thus, the tower currently violates the setback requirement to the north, and with the proposed 30-foot extension it would violate the setback requirement to the south, as well. As discussed in Part III.E. below, the Hearing Examiner recommends approval of the reduced setbacks, as permitted in Section 59-G-2.58(a).

Technical Staff suggested that the relevant neighborhood for this case, shown on the next page, is bounded by Clarksburg Road to the west, Black Hill Regional Park to the north and Clopper Road to the south. Technical Staff did not suggest an eastern boundary, but the Hearing Examiner

would pick a point about half a mile away along Clopper Road, roughly equidistant from Clarksburg Road. This relatively large “neighborhood” is appropriate due to the potential visual impact of increasing a monopole’s height. The general neighborhood as thus described is classified mostly under the Rural Zone, with R-200 zoning east of Little Seneca Creek, the subject site under the I-1 Zone, and a few acres of I-2 zoning a short distance west of the subject site between Clopper Road and the railroad tracks.

The general location of the site may be seen on the aerial photograph below.

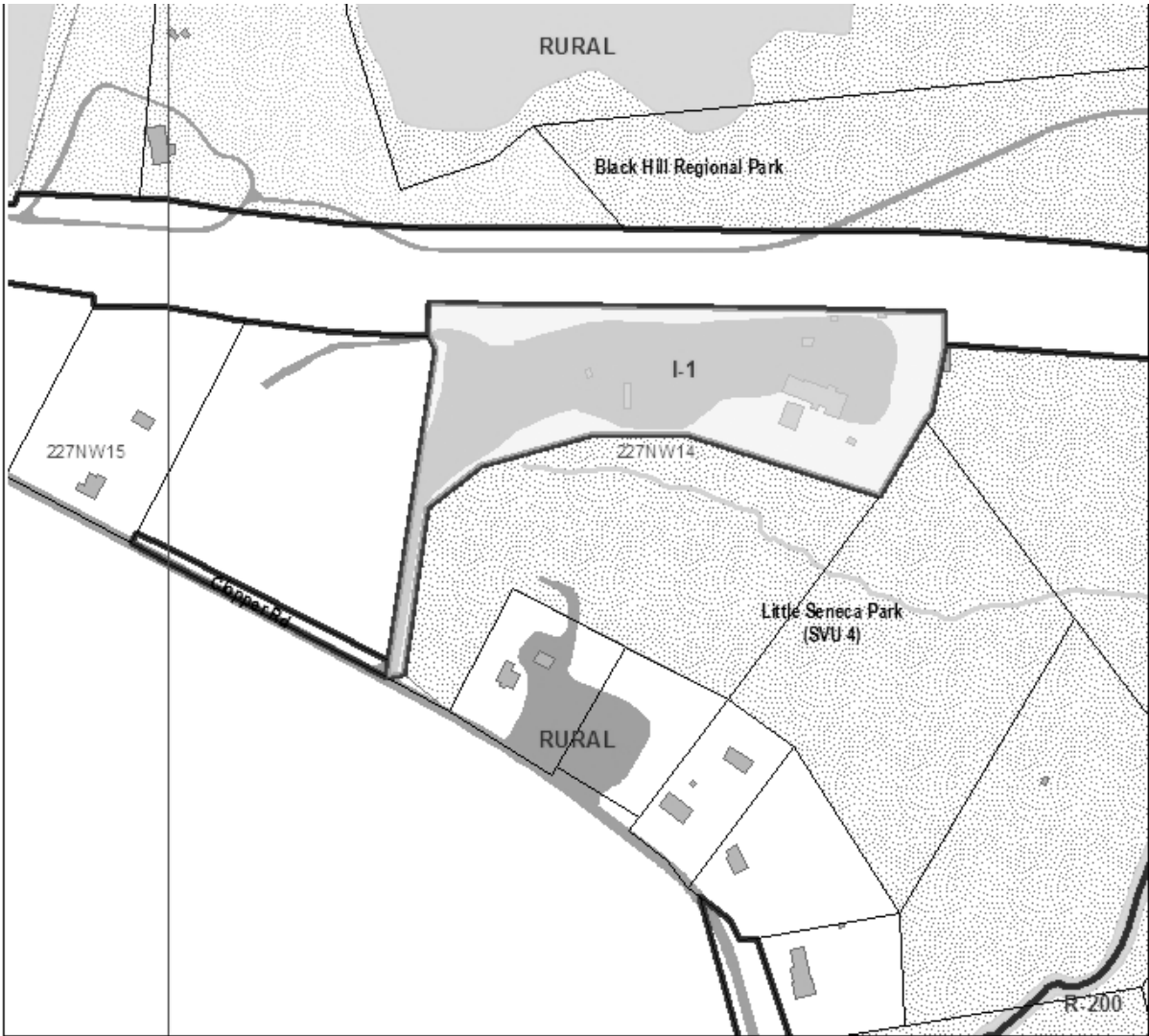
Surrounding Area Map Excerpted from Site Plan, Ex. 20 Att. 2



The subject property borders CSX Railroad tracks to the north, Little Seneca Park to the east and south and a low-density residential property to the west. About eight low-density single-family homes are located along Clopper Road just south of the subject site, both east and west of the subject property's access drive. Black Hill Regional Park is just beyond the railroad tracks to the north. Two larger, higher-density residential developments are located about half a mile from the subject site², one to the southeast and one to the northeast. Another neighborhood of large-lot homes is located just outside the defined neighborhood, a bit more than half a mile to the west. The site's relationship to its immediate surroundings is shown in the location map below. A closer view of the site is provided in the aerial photograph on the next page.

General Location Map from Staff Report, Ex. 20 Att. 1

² The Hearing Examiner scaled this distance from the map reproduced on the previous page; it is necessarily approximate due to the scale of the map.



Aerial Photograph of Subject Site (excluding driveway), Ex. 26



B. Master Plan

The subject property is within the area covered by the *Boyd's Master Plan, Approved and Adopted 1985* (the "Master Plan"), which is silent on telecommunication facilities. The Master Plan shows the subject site with its current I-1 zoning, which permits telecommunication facilities by right and by special exception, as discussed in Part III.E.

C. Proposed Use

AT&T proposes to extend the height of the existing cell phone tower from 120 feet to 150 feet and install nine panel antennas at the 147-foot level. Each antenna would be approximately 60 inches long, 18 inches wide and eight inches deep. Collocating on the existing tower would not meet AT&T's coverage needs, because as the third wireless provider on the tower, its antennas would be too low. AT&T proposes to install its equipment cabinets on an 11' x 11' concrete pad within the existing 4,770 square foot equipment compound, which is adjacent to the base of the tower and enclosed by a chain-link fence. The tower extension and the equipment compound would be able to accommodate two other telecommunication carriers, as required under the Zoning Ordinance. Expert testimony indicated that the radio frequency ("RF") emissions from the proposed facility would be within the standard established by the Federal Communications Commission ("FCC") as safe.

The location of the existing tower, which would not change under AT&T's proposal, is approximately 538 feet from the nearest single-family dwelling, which is owned by the owner of the subject site. Thus, it far exceeds the applicable setback required from off-site dwellings, which is one foot for each foot of height. It also exceeds the stricter 300-foot off-site dwelling setback that applies to monopoles in agricultural and residential zones.

With the proposed tower extension, the applicable setbacks under Section 59-G02.58(a)(1) require the tower to be at least 150 feet from all property lines. The existing tower location is approximately 100 feet from the northern property line and 145 feet from the southern property line. The Board of Appeals has the authority to reduce the setback requirement "to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates

that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.” Section 59-G-2.58(a)(1)d. Locating the tower closer than 150 feet to the northern property line makes it less visually obtrusive for the homes to the south of the site, and the five-foot reduction in the setback from the southern property line is immaterial on a site of this size. Accordingly, the Hearing Examiner recommends that the Board of Appeals approve the requested reduction in property line setbacks. This will also avoid the possibility of a greater visual impact on nearby homes if the Petitioner were to build a second tower (after a denial of the special exception), at a height of 150 feet, as a permitted use elsewhere on the site.

The proposed facility would operate 24 hours, seven days a week. The only site visits would be by maintenance staff, once or twice a month. Vehicular access is available via a long driveway connecting the industrial yard to Clopper Road.













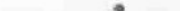

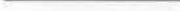
The site plan legend is shown below and the site plan graphics on the next page.

Site Plan Legend, from Exhibit 4(a)

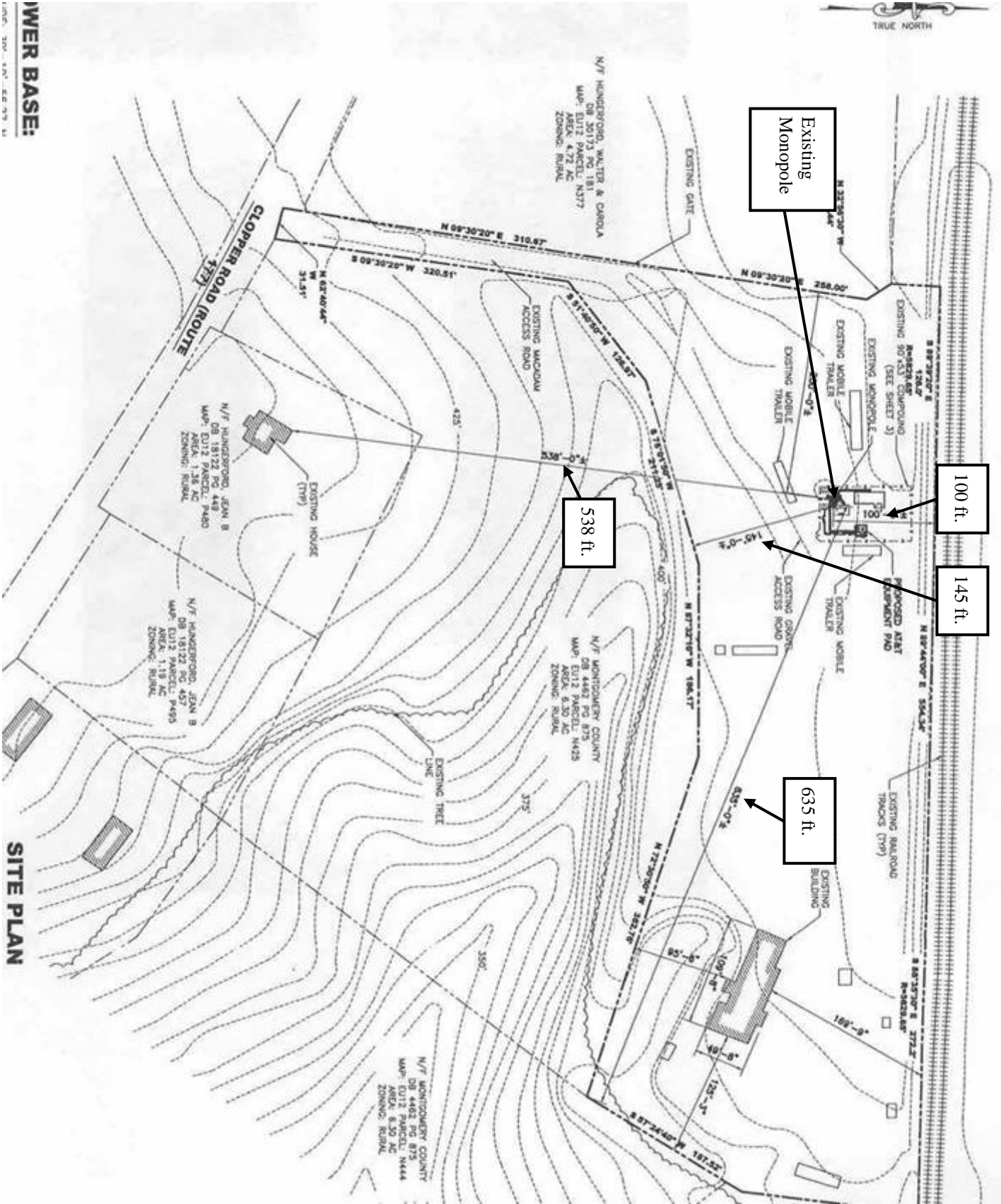
NOTE:

1. EXISTING STRUCTURE, BOUNDARY, TRUE NORTH, AND TOPOGRAPHIC INFORMATION WERE TAKEN FROM GLOCK SMIDT ENGINEERING, INC., VERIZON WIRELESS DRAWINGS DATED 12-28-05.

LEGEND:

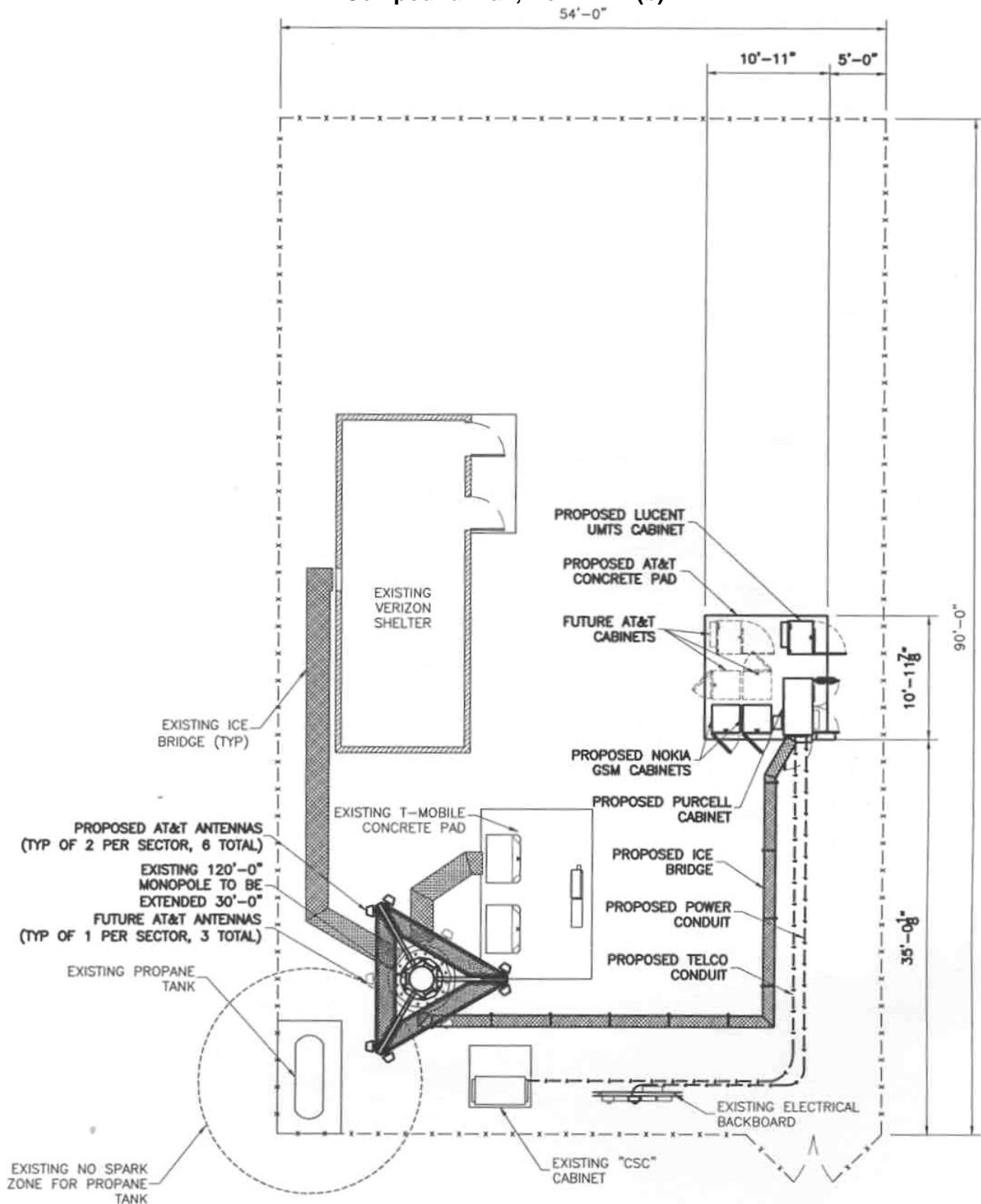
	PROPERTY LINE
	SETBACK LINE
	EXISTING CONTOURS
	EDGE OF BIT. ASPHALT PAVEMENT
	EDGE OF GRAVEL DRIVEWAY
	FENCE LINE
	TOP/TOE OF SLOPES
	CENTERLINE OF DITCH
	CULVERTS
	UTILITY/ POWER LINE
	RAILROAD SPIKE
	FOUND IRON PIN
	PROPOSED FINISHED GRADE
	PROPOSED UNDERGROUND POWER LINE
	PROPOSED UNDERGROUND TELEPHONE LINE

Site Plan Graphics, Exhibit 4(a)

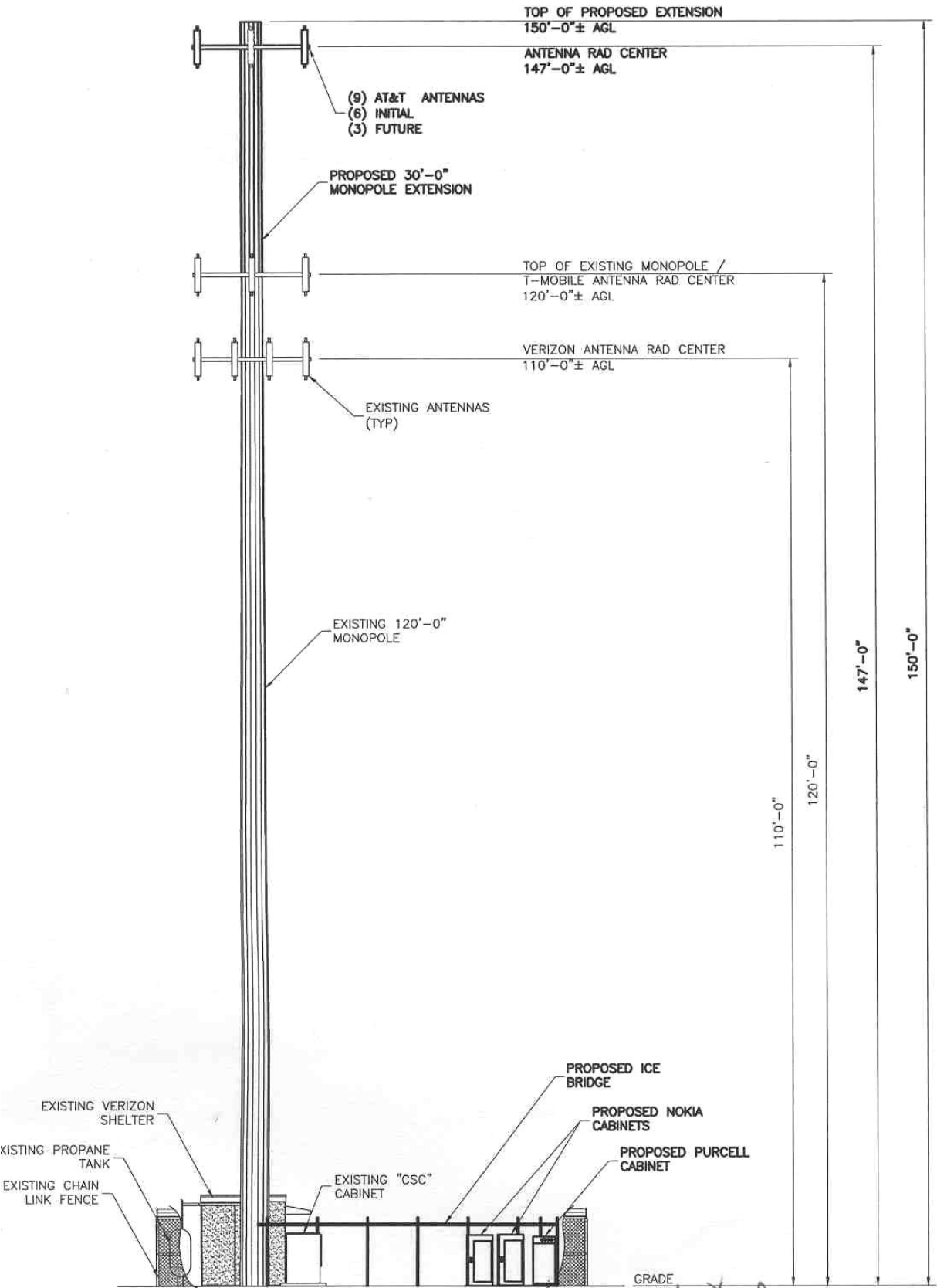


In addition to the site plan, the Petitioner has submitted detail pages, reproduced below and on the next page.

Compound Plan, from Ex. 4(b)



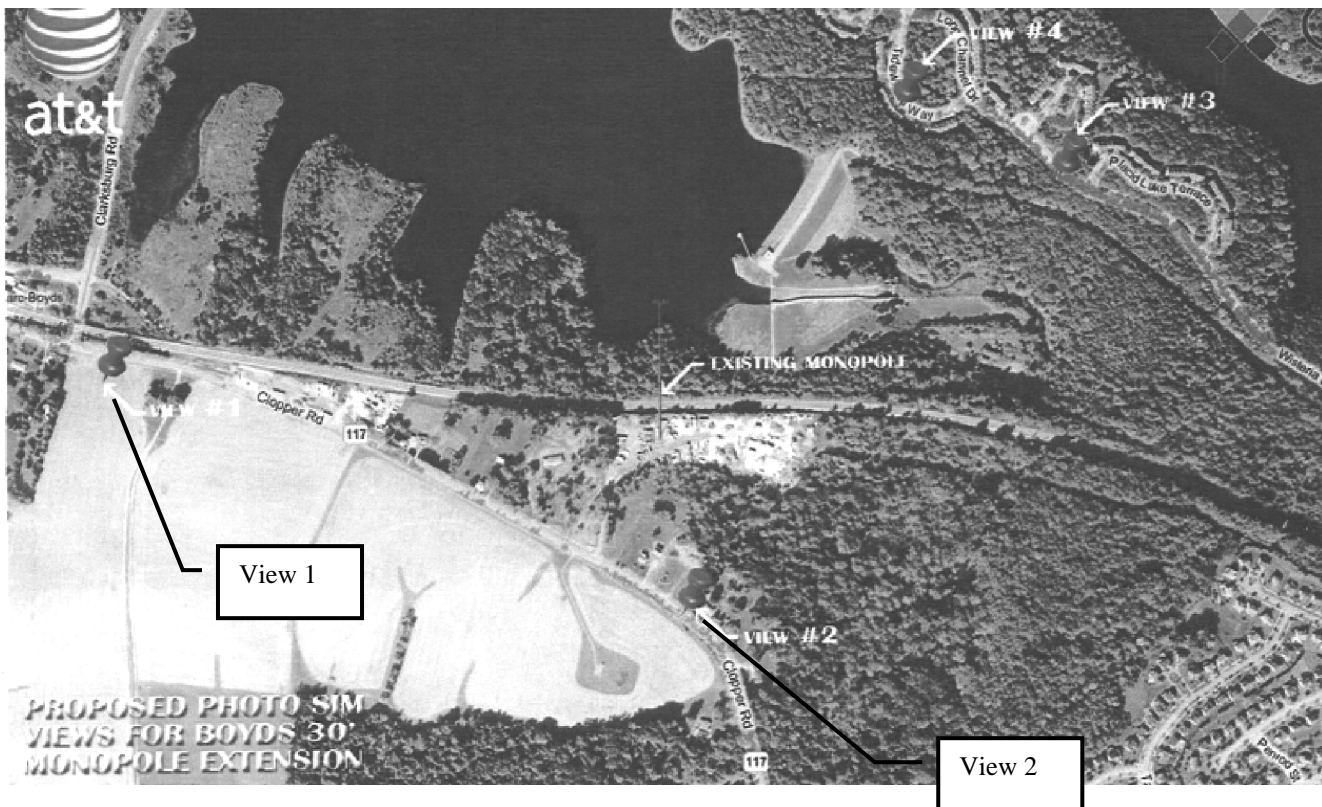
Monopole Elevation, from Ex. 4(b)



D. Visual and Property Value Impact

As shown in the aerial photograph on page 7, the equipment compound and tower are surrounded by various storage structures, vehicles and equipment in use on the site. Significant tree cover on parkland to the south and on a large home lot adjoining to the west limits the visibility of the subject site from the closest homes. Photographic evidence and testimony from two of Petitioner's consultants suggest that the tower is not readily visible from the larger residential neighborhoods half a mile away, and that the proposed tower extension would have little to no effect on the tower's visibility in those communities. While the witnesses did not specifically address visibility from the eight residences close by on Clopper Road, the submitted photographs suggest that the proposed tower extension would increase the tower's visibility in the landscape, but not to a degree that would have a material effect on the general neighborhood, given that the 120-foot tower already exists. Some of the submitted photographs are reproduced below.³

Aerial Photo Identifying Locations of Photo Simulations, Ex. 7(a)



³ Photos from points 3 and 4 are not reproduced here because their quality was too poor to be useful. Both show the existing monopole and the extension barely visible through forests of deciduous trees in winter.

**View 1 Existing. View of Current Tower from Field Slightly Southeast of Clopper Road/
Clarksburg Road Intersection. Ex. 7(b)**



**View 1 Proposed. Simulation of View with Tower Extension from Field Slightly Southeast of
Clopper Road/Clarksburg Road Intersection. Ex. 7(c)**



View 2 Existing. View of Current Tower from Clopper Road Due South of Subject Site. Ex. 7(d)



View 2 Proposed. Simulation of View with Tower Extension from Clopper Road Due South of Subject Site. Ex. 7(e)



Petitioner submitted several studies of the effect of telecommunication monopolies and similar structures on residential property values. See Ex. 14. All of the studies concluded that these structures have no material effect on the resale value of nearby residential properties. The studies appear to have followed sound methodologies and are uncontradicted in the record.

E. Applicability of the Special Exception

The present case brings to light an ambiguity in the Zoning Ordinance. The property is in the I-1 Zone (light industrial). The use table for the industrial zone has a “P” in each of the boxes next to “telecommunication facility,” indicating that this use is permitted as of right in these zones. Code § 59-C-5.2(c). A footnote explains that a telecommunication facility “is a permitted use up to 199 feet in height with a setback of one foot for every foot of height from all residential and agricultural zoned properties.” Code § 59-C-5.2(c) n. 4. The use table does not have an “SE” for a telecommunication facility in any of the industrial zones, suggesting that they are either permitted by right within the parameters stated in the footnote, or not permitted at all. This is not, however, the end of the inquiry.

Rules of statutory construction commonly applied by courts require an examination of a legislative scheme as a whole, rather than taking individual parts in isolation. See *Thomas v. State*, 277 MD. 314, cited in *Mayor and City Council of Baltimore v. Elmer Bruce*, 46 Md. App. 704, 713 (1980). As Petitioner’s counsel, James R. Michal, argued, this requires examining not only the use table for the industrial zones but also the specific conditions for the telecommunication facility special exception in Section 59-G-2.58. See Ex. 28. Section 59-G-2.58 provides, in pertinent part:

- (a) Any telecommunications facility must satisfy the following standards:
 - (1) A support structure must be set back from the property line as follows:
 - a. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.
 - b. In commercial and industrial zones, a distance of one-half foot from [the] property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one

foot for every foot of height of the support structure from residential or agricultural zoned properties.

- c. The setback from a property line is measured from the base of the support structure to the perimeter property line.
- d. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

Mr. Michal argues that this subsection authorizes the Board of Appeals to approve a setback reduction for a monopole that is permitted by right in an I-1 Zone, even without granting a special exception. See Ex. 28 at 2; Tr. at 15. The Hearing Examiner finds that this goes too far; no section of the Zoning Ordinance has been cited that gives the Board of Appeals the authority to approve any setback reduction outside the context of a special exception decision.

Mr. Michal is more persuasive when he examines the legislative intent behind the relevant provisions. As stated by the Maryland Court of Appeals, “[t]he cardinal rule [of statutory interpretation] is to ascertain and effectuate legislative intent.” *Consolidated Construction v. Simpson*, 372 Md. 434, 456 (2002), quoting *Liverpool v. Baltimore Diamond Exchange, Inc.*, 369 Md. 304, 316 (2002). “Legislative intent must be sought in the first instance in the actual language of the statute.” See *id.* Where there is ambiguity in the statutory language, “the Court will look at the larger context, including the legislative purpose, within which statutory language appears. Construction of a statute which is unreasonable, illogical, unjust, or inconsistent with common sense should be avoided.” See *id.* at 457, citing *Tracey v. Tracey*, 328 Md. 380, 387 (1992). Thus, an effort must be made to ascertain the County Council’s intent in adopting both the specific conditions in Section 59-G-2.58(a) and the “P” for this use in the industrial zones use table. This intent may be discerned from the legislative history as well as the statutory language. The Hearing Examiner is persuaded by Mr. Michal’s recitation of the legislative history that the absence of an “SE” for telecommunication facilities in the I-1 Zone is an administrative error, and does not accurately reflect the Council’s intent. See Ex. 28 at 4-6.

The history of the Zoning Ordinance's regulation of telecommunication facilities may be summarized as follows:

1. Prior to Ordinance No. 13-27, effective April 1, 1996, the use table for the industrial zones indicated that a monopole required a special exception in the I-1 Zone.
2. In 1996, the County Council adopted Ordinance No. 13-27, which significantly revised the regulation of telecommunication facilities. The use table for the industrial zones was revised to add a "P" in the I-1 Zone and the footnote cited earlier, which specified that a telecommunication facility is a permitted use up to 199 feet with a one-to-one setback from properties in agricultural or residential zones. The "SE" designation was not removed. In addition, the ordinance gave the Board of Appeals the authority to reduce the property line setback required by the special exception provisions (half a foot for every foot of height in industrial zones) to achieve a less visually obtrusive location on the site.
3. In 2002, the County Council adopted Ordinance 14-65, which, among other things, restructured and revised the specific conditions for a telecommunication facility special exception. The ordinance broadened the Board of Appeals' authority to approve a reduction in the off-site dwellings setback required for a monopole located in an agricultural or residential zone, although this authority was not extended to monopoles in industrial or commercial zones. The ordinance did not enact any changes to the use tables.
4. Ordinance No. 15-54, effective December 26, 2005, effected a significant restructuring of special exception provisions related to telecommunication facilities. Previously, the Zoning Ordinance regulated "public utility buildings, public utility structures and telecommunication facilities" as a single special exception category, with specific conditions outlined in Section 59-G-2.43. The 2005 ordinance separated telecommunication facilities from public utilities by creating a new "telecommunication facility" special exception, with specific conditions set forth in a new Section 59-G-2.58. The ordinance removed all of the specific conditions related to telecommunication facilities from Section 59-G-2.43 and reenacted them as

Section 59-G-2.58. No substantive changes were made to these provisions, and the Council Opinion that prefaces the ordinance makes no reference to any change in the zones where telecommunication facility special exceptions should be permitted. However, when the use table for the industrial zones was revised to separate telecommunication facilities from public utilities, the new line for telecommunication facilities was created with just a “P,” rather than a “P/SE”. Nothing in the ordinance suggests that the Council intended to delete the “SE” for telecommunication facilities in the industrial zones.⁴

This change in the use table created a conflict between the use table, which suggests that telecommunication facilities are permitted in the I-1 Zone *only* as a permitted use subject to specified height and setback limitations, and the regulations reenacted in Section 59-G-2.58, which clearly provide specifications for such a use in industrial zones, as well as the authority to vary them. If the Zoning Ordinance were read to prohibit telecommunication facilities as special exceptions in the I-1 Zone, the reference to such facilities in industrial zones in Section 59-G-2.58(a)(1)b would have no purpose. This is an outcome that the courts advise us to avoid: “. . . in ascertaining the intent of a legislative body all parts of a statute must be read together and all parts are to be reconciled and harmonized if possible. [citations omitted]. All parts of the statute must be read together so that no part becomes superfluous.” *City of Baltimore v. Bruce*, 46 Md. App. 704 (1980).

For the reasons set forth above, the Hearing Examiner concludes that the Board of Appeals has the authority to grant a special exception for a telecommunication facility in the I-1 Zone, and to reduce the required setback as provided in Section 59-G-2.58(a). To decide otherwise would render Section 59-G-2.58(a)(1)b superfluous, contravening the established rules of statutory interpretation, and would disregard the absence of any legislative intent to remove the telecommunication facility special exception from the I-1 Zone. As applied to this case, holding that a special exception is not permitted could result in the Petitioner building a second tower, at a height of 150 feet, as a permitted

⁴ As Mr. Michal points out, this was not the only administrative error. Ordinance 15-54 made changes to the definition of “telecommunication facility,” but failed to change the reference to the applicable special exception provisions from Section 59-G-2.43 to the new Section 59-G-2.58. This error persists to this day.

use elsewhere on the site, where the 150-foot setback can be met. This outcome would be contrary to the County Council's long-held policy, as reflected in the County's regulation of telecommunication facilities since 1996, to promote the use of existing monopoles and thereby minimize the number of new ones.

F. Need for the Proposed Facility

The Montgomery County Code requires that the County's Chief Information Officer (the Director of the Department of Technology Services, or "Director") "establish and maintain a process to coordinate the location of public and private telecommunications facilities in the County." Code § 2-58E (a). The County Executive must issue regulations to implement this process. As part of this process, a designee or contractor selected by the Director (known as the "Tower Coordinator") must review the siting of each proposed facility, advise any land use agency with jurisdiction over the siting of transmission facilities (including the Board of Appeals and the Planning Board) on "the technical rationale at that location for any transmission facility," and make a recommendation as to the proposed location. See Code § 2-58E(c); Executive Regulation 14-96, effective December 10, 1996. The Director must also convene a Transmission Facility Coordinating Group (known as the "Tower Committee") consisting of the Tower Coordinator and representatives of the MNCPPC, the Office of Management and Budget, the cable television administrator in the Department of Technology Services, the Department of Public Works and Transportation, the Department of Permitting Services ("DPS") and any other County, bi-county, or municipal department or agency the Director invites to send a representative. See Code § 2-58E(d)(1). The Tower Commission must review and comment on any pending transmission facility siting issue. See Code § 2-58E(d)(2).

The record in the present case does not include a recommendation from the Tower Coordinator.⁵ The Tower Committee, however, considered T-Mobile's application at a meeting on May 30, 2009 and voted to recommend approval of the proposal to extend the tower from 120 feet to

⁵ The specific conditions for a telecommunication facility special exception require submission of a Tower Committee recommendation, but do not mention the Tower Coordinator.

150 feet, conditioned on approval of a special exception by the Board of Appeals. See Ex. 23. The recommendation indicates that when the tower was originally approved, the applicant lowered the proposed height from 150 feet to 120 feet and relocated the monopole to another location on the site due to concerns raised by the Tower Committee. A 30-foot extension for this monopole has been on the site since the tower was built, waiting inside the equipment area in anticipation that it would be needed. The Tower Committee acknowledged that putting on the extension would cause the monopole to violate setback requirements (the Committee recommendation stated that the original tower satisfied the 120-foot setback requirement, which is not accurate). The Committee concluded that a special exception would be needed to approve the extension.

The Tower Committee further concluded that the additional height proposed for this tower may increase the tower's visibility from some views in the community. Based on a site visit, the Committee found that "the impact may be minimal because the monopole is visible today from a limited number of locations and even then the distance of the monopole from those locations minimizes the visual impact. One such location is along Clarksburg Road on approach to Boyds and the other is along Clopper Road where it nears the [subject] property." Ex. 23. Finally, the Committee found that the submitted contour maps show that antennas at the lower elevation currently available on the tower would not provide coverage at the desired signal level for "residents of the Churchill community to the east of the site," and that there are no existing structures in the vicinity that would meet AT&T's service needs. See Ex. 23.

The Zoning Ordinance requires the Planning Board and the Board of Appeals to make separate findings that there is a need for the proposed facility at the proposed location. See Code § 59-G-2.58(a)(12). The Planning Board has recommended approval of this application based on the findings in the Staff Report, which include the observation that the Tower Committee found a justified engineering need for the proposed facility. See Staff Report at 4. The Tower Committee recommendation in the record does not contain a specific finding of need, but that finding may be considered implicit in the recommendation of approval.

The Board of Appeals has consistently interpreted the “need” requirement in telecommunications facility cases to mean a need to improve coverage to meet a cell phone carrier’s service objectives. T-Mobile presented expert testimony and RF coverage maps to demonstrate that it has a need for the proposed facility. The coverage maps, reproduced in an appendix to this report, show that the proposed facility would improve coverage significantly in the area of the site. See Exs. 9(a) and 24.

G. Lighting, Signage, Utilities, Traffic and Environment

No lighting or signage is proposed in connection with the proposed tower extension. Electric and telephone utilities are already available on site, and no other utilities would be needed for the proposed facility.

Technical Staff concluded that the proposed facility would not have any adverse impact on the transportation network because it would generate only a very small number of trips to the site, consisting of maintenance visits once or twice a month. See Staff Report Attachment 10. Even if two other companies were to co-locate on the site in the future, their total traffic generation would be only four to six trips per month, except for possible emergency visits.

Environmental Planning Staff reports that the proposed tower extension would have no environmental impact. See Staff Report Att. 11. Historic Preservation Staff at the MNCPPC reports that the subject property is “in the proximity of” the Boyds Historic District and the Winderbourne, a district and site listed in the Master Plan for Historic Preservation. See *id.* Att. 13. Staff considers the proposed tower extension unlikely to have more than a minimal adverse effect on these historic resources.

IV. SUMMARY OF HEARING

A. Applicant's Case in Chief

1. Shashikanth Sena, RF engineer. Tr. at 29-34.

Mr. Sena has been an RF engineer for AT&T Wireless for almost five years. He was responsible for evaluating the subject site and determining the height needed to achieve coverage objectives. Mr. Sena opined that the proposed structure height of 150 feet is necessary to achieve coverage objectives on roads, in residential areas and inside buildings. He noted that because of users' demands for in-building coverage, there is greater importance on reliability of the network and connectivity to adjoining sites. In addition to wireless voice service, he noted that AT&T also offers data and multi-media transmission, which require a lot of band width and a higher signal level.

Mr. Sena opined that the proposed facility would operate within the federally mandated emission standards. He noted that wireless carriers provide electronic connections to the local 911 service for all cell phone users, not just their own subscribers, so improved signal strength is an important safety issue. Mr. Sena stated that most of the service problems that the proposed facility is intended to resolve are the inability to make calls in certain areas.

2. Chris Blackburn, site acquisition consultant. Tr. at 35-50.

Mr. Blackburn is a site acquisition consultant contracted to the Petitioner, and has been engaged in this field for ten years. His job is to take the search area information from the RF engineer and find potential sites to provide coverage. In this case, he negotiated the lease with the owner of the existing tower. Mr. Blackburn has visited the subject site and surrounding neighborhoods, most recently the day before the hearing. He presented an aerial photograph showing the location of the subject site and the approximately location of the tower, testifying that it accurately reflects current conditions. Mr. Blackburn pointed out various features on the photograph, including train tracks, a lake, a County park to the east, a farm to the south, and four homes to the west on Wisteria Drive, the closest of which belongs to the owner of the subject site.

Mr. Blackburn presented a second aerial photograph that shows a closer view of the subject site, testifying that it accurately reflects current conditions on the property. He pointed out the location of the tower, which is clear from its shadow, falling from southwest to northeast. Mr. Blackburn described the condition of the property, which has several trash trucks, storage for port-a-potties, a couple of sewage trucks, and at the center of the pictures some box trailers that would go on an 18-wheeler. He pointed out 10 to 15 structures including the containers and a larger shed-type building, some junked cars, a school bus, and seven to eight piles of debris. In sum, he characterized the site as a densely utilized industrial area.

Mr. Blackburn stated that utilities are available on site, and any additional utilities needed could be brought underground. He noted that the amount of power needed is about a 200 amp service, similar to typical household usage. The only trips expected in connection with the proposed facility are a monthly maintenance visit. Mr. Blackburn stated that the facility would not generate any noise, dust or glare.

Mr. Blackburn observed that during his pre-hearing drive through nearby residential communities, he was unable to see the existing tower due to dense tree coverage with an average height of 80 to 100 feet. He opined that the proposed 30-foot extension of the tower would have no visual impact on nearby residential communities. Mr. Blackburn is not aware of any concerns about the proposed tower extension from Montgomery County Parks, which owns the property immediately south of the subject site. Finally, he confirmed that the Petitioner's submitted statement of operations is accurate.

3. John B. McGrath, engineering firm representative. Tr. at 51-65.

Mr. McGrath is managing principal agent for CMX Engineering in Maryland. He is not an engineer, but has worked with his firm's engineers on several thousand wireless telecommunication projects around the country. His firm prepared the drawings presented in this case, and he has driven through the nearby residential areas. He agreed with Mr. Blackburn's description of the subject site, noting that it is the home base for a construction company that takes materials in and out on a daily

basis, probably generating a fair amount of noise and dust. He also concurred in Mr. Blackburn's estimate that trees in the area average 80 to 100 feet in height, and in his observation that the existing tower is not visible from the nearby residential neighborhoods. Mr. McGrath opined that the proposed 30-foot tower extension would have no visual impact on nearby residential communities, basing his opinion on his personal observations from driving through the neighborhoods as well as photographic simulations that his company prepared of what the extension would look like when seen from various locations. He testified that they had a difficult time identifying locations where the tower extension could be seen.

Mr. McGrath testified that a 150-foot tower could be located on the subject property by right, meeting all setback requirements, at a location just north of the large shed. That would place a new tower closer to nearby residential communities by about 500 feet. He stated that wireless carriers prefer to use an existing tower whenever possible, both to reduce expense and to make the approval process easier. He noted that the proposed extension would have room for two additional carriers. Currently, the tower has two carriers. Mr. McGrath explained that the Petitioner could not collocate on the existing tower because the space available was too low to meet the coverage objectives.

V. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context, because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed special exception would satisfy all of the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby

properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunication facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Physical and operational characteristics associated with a telecommunications facility include antennas installed on or within a support structure with a significant height; an equipment platform and equipment cabinets that may or may not be enclosed within a fence; visual impacts associated with the height of the support structure; RF emissions; a very small number of vehicular trips per month for maintenance; and some form of back-up power. In the present case, Technical Staff concluded that the only non-inherent effect of the proposed facility is its location, which requires a reduction in the normal setback from both the northern and southern property lines. See Staff Report at 5. Staff found no unusual site characteristics.

The Hearing Examiner agrees with Technical Staff that the request for reduced setbacks must be considered a non-inherent characteristic of the proposed special exception because it is not necessarily associated with the use; many monopoles comply with the setbacks specified in the Zoning Ordinance. The Hearing Examiner also agrees with Staff that this non-inherent characteristic, taken alone or in combination with the inherent adverse effects of the use, does not justify denial of the application, and that there are no unusual site characteristics that should be considered non-inherent adverse effects. The proposed special exception would increase the height of the tower by 25 percent, and increase the number of antennas arrayed around it. This would increase the visibility of the structure from some nearby locations, and potentially from a small number of homes. Given that the neighborhood already includes the existing 120-foot tower as part of its landscape, the submitted photographs suggest that increasing the height of the tower would not have a material or even a noticeable adverse effect. Locating tower closer than 150 feet to the northern property line makes it less visually obtrusive for the homes south of the site, and the five-foot reduction in the setback from the southern property line is immaterial on a site of this size. The additional equipment on the ground would have no discernible impact on the neighborhood, since the equipment compound is in the middle of an intensely used industrial site. Similarly, increasing the number of telecommunication facility maintenance visits by one or two per month would have no adverse effect on the neighborhood.

B. Specific Standards

The specific standards for a telecommunications facility are found in § 59-G-2.58. As outlined below, the evidence of record demonstrates compliance with the specific standards.

Sec. 59-G-2.58. Telecommunications facility.

(a) Any telecommunications facility must satisfy the following standards:

(1) A support structure must be set back from the property line as follows:

a. In agricultural and residential zones . . .

- b. In commercial and industrial zones, a distance of one-half foot from [the] property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.
- c. The setback from a property line is measured from the base of the support structure to the perimeter property line.
- d. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

Conclusion: The subject site is in an industrial zone and borders properties in agricultural zones on all four sides. The proposed special exception would extend the height of the existing tower to 150 feet, requiring a 150-foot setback from all property lines. As discussed in Part III.E above, the Hearing Examiner recommends granting the request to reduce the setback requirement to 100 feet to the north and 145 feet to the south.

- (2) A support structure must be set back from any off-site dwelling as follows:
 - a. In agricultural and residential zones, a distance of 300 feet.
 - b. In all other zones, one foot for every foot in height.
 - c. The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.
 - d. The Board of Appeals may reduce the setback requirement in the agricultural and residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.

Conclusion: The subject site is in an industrial zone and the proposal would increase the tower height to 150 feet, so a 150-foot setback applies. As shown on the submitted site plan, the proposed

facility would more than satisfy this requirement. The existing tower is and would remain approximately 538 feet from the nearest off-site dwelling.

- (3) The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.

Conclusion: Petitioners request a support structure height lower than 155 feet.

- (4) The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.

Conclusion: This application does not seek to change the location of the support structure, which minimizes its visual impact by placing it in the middle of the industrial site, at a significant distance from other properties. The application seeks to increase by 30 feet the height of a 120-foot tower that is located in the midst of a heavily used industrial site, substantially screened from nearby properties by distance and heavy tree coverage. These circumstances do not warrant measures to make the support structure less visually obtrusive. Finally, the equipment compound is effectively screened from view from neighboring properties by distance, trees and large equipment and structures surrounding the compound within the industrial site.

- (5) The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board may approve a support structure holding less than 3 telecommunications carriers if:

1) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and 2) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunication facility for all the carriers.

Conclusion: The property owner is an applicant for the telecommunications facility special exception. Undisputed evidence demonstrates that both the proposed tower extension and the equipment compound can accommodate no less than three telecommunications carriers.

- (6) No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

Conclusion: No signs or illumination are proposed on the antennas or the support structure.

- (7) Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.

Conclusion: AT&T understands this requirement.

- (8) support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

Conclusion: Petitioners must comply with this requirement.

- (9) Outdoor storage of equipment or other items is prohibited.

Conclusion: No storage of equipment or other items outside the equipment compound is proposed.

- (10) Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.

Conclusion: No finding necessary.

- (11) The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility

Coordinating Group regarding the telecommunications facility. The recommendation must be no more than one year old.

Conclusion: Petitioners filed with the Board a recommendation from the Transmission Facility Coordinating Group that was issued in May 2008, less than one year before the application was filed.

- (12) Prior to the Board granting any special exception for a telecommunications facility, the proposed facility must be reviewed by the County Transmission Facility Coordinating Group. The Board and Planning Board must make a separate, independent finding as to need and location of the facility.

Conclusion: The present application was reviewed by the Transmission Facility Coordinating Group, as discussed in Part III.F. The Planning Board, adopting the reasoning in the Staff Report, recommended approval at the proposed location. As discussed in Part III.F., the Hearing Examiner is persuaded that T-Mobile has demonstrated a need for the proposed facility to provide enhanced cell phone service to its customers. As discussed above in connection with Section 59-G-2.58(a)(4), the Hearing Examiner finds that the location proposed for the facility appropriately minimizes its visual impact. Accordingly, the Hearing Examiner finds that the proposed location is appropriate.

- (b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Conclusion: Not applicable.

- (c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.

Conclusion: Not applicable.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: For the reasons set forth in Part III.E, the Hearing Examiner concludes that a telecommunications facility is a permitted special exception use in the I-1 Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would comply with the standards and requirements set forth for the use in Code §59-G-2.58, as detailed in Part V.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The evidence supports a conclusion that the proposed use would be generally consistent with the recommendations of the *Boyd's Master Plan*, which is silent on the subject of telecommunication facilities.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the

Growth Policy standards in effect when the special exception application was submitted.

Conclusion: As discussed in Part V.A and in response to paragraph (a)(4) in Part V.B., the Hearing Examiner concludes, based on the preponderance of the evidence, that the proposed tower extension would be harmonious with the general character of the neighborhood. Unrefuted evidence demonstrates that public services and facilities would be adequate to serve the proposed development.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that, for the reasons stated in Part V.A and in response to paragraph (a)(4) in Part V.B., the proposed use would not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood. The Hearing Examiner considers the monopole-impact studies submitted by the Petitioners to be sufficient evidence that the proposed tower extension would not be detrimental to the economic value or development of surrounding properties.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust or physical activity at the subject site.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: No other special exceptions have been identified in the general neighborhood.

The Hearing Examiner agrees with Technical Staff that permitting this special exception would not affect the area adversely or alter its primarily residential nature.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports a conclusion that the proposed special exception would not adversely affect the health and safety of residents in the area of the subject site. As noted during the hearing, federal law prohibits local governments from considering the effects of RF emissions in deciding whether to permit telecommunication facilities, as long as the emissions are below a standard established by the FCC. Unrefuted expert testimony in this case establishes that the facility's RF emissions would be below the FCC standard.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the proposed use and would have no adverse effect on public facilities.

- (A) If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.
- (B) If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

Conclusion: Subdivision approval would not be required. The Hearing Examiner accepts Technical Staff's conclusion that the very small number of vehicle trips the proposed use would generate can be accommodated by the local roadway network, and that Policy Area Mobility Review does not apply due to the small number of trips.

- (C) With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

Conclusion: The evidence strongly supports a conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic on the public roads, as it would contribute only a minimal number of vehicles to area roadways.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: For the reasons stated above, the Hearing Examiner concludes that Petitioners have met their burdens of production and persuasion.

59-G-1.23 General Development Standards

Pursuant to Section 59-G-1.23, each special exception must comply with the development standards of the applicable zone where the special exception is located, unless the specific conditions for the use specify development standards, which is the case for telecommunications facility special exceptions. Section 59-G-1.23 also requires compliance with applicable parking requirements under Article 59-E, forest conservation requirements under Chapter 22A, and sign regulations under Article 59-F, and states that a special exception must incorporate glare and spill light control devices to minimize glare and light trespass and, in a residential zone, may not have lighting levels along the side and rear lot lines exceeding 0.1 foot candles.

Parking is available on the industrial site for the modest needs of this use. No forest conservation requirement applies because no forest would be disturbed. No signage is proposed other than what is required under the specific conditions for the use. No lighting is proposed.

VI. RECOMMENDATION

Based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2747, which requests a special exception in the I-1 Zone for a telecommunications facility to be constructed on property located at 14615 Clopper Road, Boyds, Maryland, Tax Account No. 00021970, be granted subject to the following conditions:

1. Petitioners shall be bound by all of the testimony of their witnesses and exhibits of record, including the Site Plan and detail sheets, Exhibits 4(a) through (e), and by the representations of counsel identified in this report.

2. The subject facility must not have any exterior lighting or signage, with the exception of the warning sign required under Section 59-G-2.58(a)(8). Under that provision, the support structure must be identified by a sign no larger than 2 square feet, affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership

3. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits or a use-and-occupancy permit, necessary to implement the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and facility comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: October 9, 2009

Respectfully submitted,



Françoise M. Carrier
Hearing Examiner

Appendix: Coverage Maps